Articles

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The Fair Contract in the Constitutional System: Principles as an Imperative Content of Codified Rules in the Italian Case-Law by Giuseppe Vettori

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Abstract: The evolution of the system of sources ruling the institution of contract is a highly sensitive topic amongst Italian scholars. Contract law is no longer a system of rules and structures requiring conformity, but it is encrusted with case law and doctrine. Norms often lack a statutorily-governed situation required by law. Instead of a judgment whether conduct conforms to a given rule, what is required instead is the balancing of different values. A different legal order, based on new values, is coming. Justice in trials and the fairness of contracts are no longer invoked as tools to protect class interests, but as a way to express constitutional values. By the so called 'fair decision's' argument, the principles of trial procedure construct a new set of judicial decisions. Fairness in contract becomes an essential tool through the principle of an effective remedy (Article 24 Italian Constitution, Articles 6 and 13 ECHR, Article 47 CFREU). The new legal order is based on both legal rules and legal principles. The former are *a prius* instead of *a posterius*. They guide judges, lawyers and scholars and give them directions on the objective to pursue. This is made possible by a new and rigorous argumentative technique: a different relationship between facts and values, the centrality of the principle of reasonableness, the attention to in the European Courts and the 'conscious' use of the techniques of Community law. The relationship between the legislative function and the implementation of rules and principles is changing and, nowadays, they are on an equal footing. This has direct consequence both on the 'democratic form' and contract law, which is becoming more and more different from that of the 20th century.

Résumé: L'évolution des sources du droit en matière de contrat est un thème très sensible dans la doctrine italienne. Le droit des contrats n'est plus un système

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hiérarchisé de règles et d'institutions, mais relève de la jurisprudence et de l'interprétation doctrinale. Les normes appliquées manquent souvent de statut legal et conduisent plutôt à une mise en balance de valeurs différentes qu'à l'application déductive d'une règle. Il faut y voir le signe de l'avènement d'un ordre juridique different, basé sur de nouvelles valeurs. La justice procédurale et contractuelle ne constitue plus un outil de protection des intérêts catégoriels mais permettent d'exprimer des valeurs constitutionnelles. A travers l'argument de la "décision juste", les principes processuels construisent une nouvelle jurisprudence. La justice dans le contrat se réalise par le prncipe du droit à un remède effectif (Art. 24 de la Constitution italienne, arts 6 et 13 de la CEDH, art. 47 CFRUE). L'ordre nouveau est fondé sur les règles et des principes juridiques. Ces derniers s'imposent a priori, et non ex post. Ils guident les juges et les interprètes et leur indique des objectifs à poursuivre. Ceci es t rendu possible par une technique argumentative nouvelle et rigoureuse: une reconfiguration des faits et des valeurs, la centralité du principe du raisonnable, l'autorité des cours européennes et l'utilisation consciente des techniques du droit de l'Union. La relation entre la function legislative et la mise en oeuvre de règles et de principes est en train de changer, de sorte qu'aujourd'hui, ils sont sur un pied d'égalité. Ceci a une incidence sur la forme démocratique et le contenu du droit des contrats, qui s'éloigne de plus en plus de celui du vingtième siècle.

Zusammenfassung: Die Frage danach, wie sich das System des Vertragsrechts insgesamt fortentwickelt, ist eine hochkontrovers Diskutierte in Italien. Vertragsrecht wird nicht mehr als ein System von Regeln und Strukturen gesehen, das sich durch Widerspruchslosigkeit auszeichnet und von diesem Aspekt her konzipiert werden kann, sondern als ein System zwischen Fallrecht und Doktrin. Normen geben häufig keine Antwort, die klar gesetzlich verankert wäre und es solchermaßen erlauben würde, ihre Normkonformität eindeutig zu bestimmen oder vorherzusagen. Vielmehr ist für die Lösung des Falles eine Abwägung von Werten nötig. Eine andere Art Rechtsordnung, basierend auf neuen Werten, ist im Entstehen. Gerechtigkeit im Gerichtssaal und im Vertragsrecht werden nicht mehr primär als Instrumente gesehen, die Individual- oder Gruppeninteressen schützen sollen, sondern als Ausdruck von Verfassungswerten. Durch das sog. „fair decicion's" Argument werden die Verfahrensprinzipien zu einem neuen Cluster von Entscheidungsgruppen gebündelt. Ein fairer Vertrag zeichnet sich vor allem durch eine effiziente Durchsetzung aus (Art. 24 der italienischen Verfassung, Art. 6 und 3 EGMRK und Art. 47 Gemeinsamer Referenzrahmen). Die neue Rechtsordnung verbindet Rechtsnormen und Rechtsprinzipien. Die Letztgenannten kommen heute auch zuerst, sie führen den Richter, Praktiker und Wissenschaftler und geben ihm eine Zielrichtung, die er verfolgt. Dies wird durch eine neue

Argumentationstechnik ermöglicht: Zwischen Tatsachen und Prinzipien besteht ein neues Verhältnis, gekennzeichnet durch das insoweit ganz zentrale Konzept der „Reasonableness", dem der EuGH und die Europäischen Gerichte besonderes Gewicht zumessen. Die Beziehung zwischen der Gesetzgebungsfunktion und ihrer Umsetzung in Prinzipien und Regeln ändert sich heutzutage, sie stehen sich zunehmend „auf Augenhöhe" gegenüber. Dies zeitigt seine Wirkung sowohl im Hinblick auf den „demokratischen Prozess" und auf das Vertragsrecht – die beide zunehmend anders werden als wir dies im 20. Jahrhundert kannten.

1 Going beyond the situation required by law (*fattispecie*)

Legal sciences are increasingly studying the ongoing changes to the sources of the legal system[1] within the current historical context, which is marked by extremely clear events. These developments include the reestablishment of a strong bond between law and society, the erosion of the State's legislative monism, and the production of law which is increasingly less 'legal and mostly delegated to the interpretation of Courts and legal scholars'.[2] This has a direct consequence.

Legal scholars are increasingly assessing the changes occurring to the method and techniques of private law. The crisis of the situation required by law is marked by an intense and refined analysis aimed at scrutinizing the past and present world.

1 See for instance the issue related to the interplay between the newly enacted legislation on the economic and monetary union and the existing EU treaties. On this point L.F.M. Besselink, 'Parameters of constitutional development: The fiscal compact in between EU and member state constitutions', in L.S. Rossi and F. Casolari (eds), *The EU after Lisbon: amending or coping with the existing treaties?* (Cham: Springer: 2014) 21–35. Another example might be the US debate over the legitimacy of citation to foreign sources of law by the Supreme Court: See on this point: D. Zaring, 'The Use Of Foreign Decisions By Federal Courts: An Empirical Analysis' 3 *Journal of Empirical Legal Studies* 297 (2006); S.G. Calabresi and S.D. Zimdahl, 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision' 47 William & Mary Law Review 743 (2005).

2 P. Grossi, 'Sulla odierna "incertezza" del diritto' www.giustiziacivile.com (2014). On this point, the ECJ is for instance increasingly granting more and more power to national courts to enforce the charter of foundamental rights see European Court of Justice 26 February 2013, case 617/2010, *Åklagaren* v *Hans Åkerberg Fransson* [2013], ECR 2013–00000.

On the one hand, the past system is examined. It was designed to create certain structures in order to defeat uncertainty and 'dominate the unpredictable', through 'a simplifying system of types', enabling the rule 'to anticipate the reality' and 'conquer the future', with 'certainty and predictability'. On the other hand, the changes occurring to the constitutional State are also considered, where rules without a situation required by law may lead the interpreter to 'rise from law to values'. Accordingly, legal reasoning follows other paths. The positive system is replaced by an 'objective system of substantive values', where rules are no longer self-sufficient, but they are rather justified and supported by something else that can somehow use them. This is a reference to values, which 'have cancelled the problem of gaps', since values 'are worth in and for themselves, they do not need other rules or intermediate mechanisms; they rely only on themselves'. All of this, as it is clearly argued, does not prevent the work of jurists. They only need to continue their work under a new horizon.[3]

It is just a matter of specifying how. Italian law is a codified system. The codification is from the fascist era, often amended since then, but nevertheless it constitutes a good example because the constitutional values as such have been enacted mostly posterior to the codification itself. Therefore the interplay between rules and values – with a potential supremacy of the values, but at the same time more precise definition of the rules – can be found in Italian law in particular. The same is certainly true for Germany, and it is not by chance that these are the only two jurisdictions in the European Union where also the influence of fundamental rights on private law is experienced most directly.[4]

3 N. Irti, 'La crisi della fattispecie' *Rivista di diritto processuale* 1 (2014) 38 *et seq*; N. Irti, 'Calcolabilità Weberiana e crisi della fattispecie' *Rivista di diritto civile* 2014, 987 *et seq* but also M. Hesselink, 'The general principles of civil law: Their nature, roles and legitimacy. In the involvement of EU law in private law relationships', in D. Leczykiewicz and S. Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Oxford: Hart Publishing, 2013) 131–180; G. Alpa, 'I "principi generali del diritto civile" nella giurisprudenza della Corte di Giustizia' *Giustizia civile* 2 (2014) 325 *et seq*. D. Kennedy, 'The political stakes in "Merely technical" issues of contract law' *European Review of Contract Law* 2002, 7–28.

4 On the following see more extensively: O. Cherednyschenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party – a Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (Antwerp: Intersentia, 2007); O. Cherednyschenko, 'EU Fundamental Rights, EC Fundamental Freedoms, and Private Law' (2006) 14 *European Review of Private Law* 23–61; S. Grundmann (ed), *Constitutional Values and European Contract Law* (Alphen: Kluwer Law International, 2007); in this volume, see also G. Vettori, 'The Institutional Perspective: the European Economic and Social Constitution and the Role of Contract Law', in Grundmann (ed), this note, 205–214.

Rights, principles, and contractual rebalancing. Courts are aware of these recent developments and, after having followed the positivist closed approach, have stepped back by dealing with the regulation of contracts in different times and places.

Two recent rulings of the Italian Constitutional Court,[5] which have endorsed a well-established approach of the Italian Court of Cassation, have strengthened the role of constitutional principles in contract regulation.

The opportunity was provided by a case concerning the regulation of a confirmation deposit, whose unconstitutionality was maintained in relation to the part of the provision making the Court unable to reduce the payable amount 'where it is blatantly disproportionate'. The petitioner argued that the rule (Article 1385 of the Italian Civil Code) did not leave the Court any room for interpretation in order to restore objective fairness and the overall contractual balance.[6] The Court rejected such argument in two rulings providing a constitutional interpretation of great impact and importance, going beyond the issue at stake related to the confirmation deposit. It is sufficient to read the plain text of the rulings.

The inadmissibility was held because the petitioner did not take into account *'the possible room for Court's intervention should there be a clause mirroring (as in the present case) an unfair regulation of opposing interests, highly unbalanced up to the detriment of one party'*. In such cases, the Court can automatically intervene by declaring *'the clause (totally or partially) void pursuant to Article 1418 of the Civil Code, being in conflict with Article 2 of the Constitution (concerning the mandatory duty of solidarity) which is directly incorporated into the contract and, together with the principle of good faith, is assigned with statutory power'*[7].The authoritative nature of these holdings leads us to analyze in more detail their grounds. The above-mentioned precedents recall a well-established approach.

5 Constitutional Court, 24 October 2013, n 248 and 22 April 2014, n 77. Constitutional Court cases can be accessible through the official website of the Court at: http://www.cortecostituzionale.it/actionPronuncia.do providing the number and year of the case. In the official website, you may find also an English version of a number of selected judgments at http://www.cortecostituzionale.it/ActionPagina_1260.do.

6 Constitutional Court, 22 April 2014, *ibid*.

7 The Court upheld the power of the constitutional provision to functionalize 'the duty to also the interest of the negotiating partner so far as to the extent that it does not collide with the interest of the obligor', with reference to previous case law: Decision n 10511/1999; n 3775/1994 and, the Court (plenary session), rulings n 18128/2005 and n 20106/2009. Court of Cassation cases for the last 5 years can be freely accessible through the official website of the Court at: http://www.italgiure.giustizia.it/sncass/ providing the number and year of the case. Older cases can be accessible through the legal database http://www.italgiure.giustizia.it/index_it.asp that require specific credentials.

a) The excessive penalty clause. The first ruling[8] concerned the possibility for the Court to raise the issue of the penalty clause of its own motion, but it gives us also the opportunity to think again about the corrective power of the Court before a private act or conduct which does not comply with the constitutional system in force. Yet, there is more. The ground of the decision aims to expressly overcome the formalism of previous case-law and to reinterpret the rules of private law in a manner that complies with constitutional rules and principles. This is done with a precise purpose: to overcome the idea of the centrality of the parties' will in order to emphasize the prime interest of the system to oversight private autonomy via the Courts. The latter should take into account the balancing of 'values' of equal constitutional importance, which ultimately converge into the contract. Reference is made to Article 41 of the Italian Constitution, which recognizes economic freedom, and to the duty of solidarity under Article 2 of the Italian Constitution, which is incorporated – as stated – into the contract, as an internal limit to any legal position, and which passes on, through good faith, into the process of assessing the party's behaviour, so to allow the Court to reject claims based on contractual obligations, as well as to evaluate the compliance, on the basis of such balancing process, of the very existence of the contractual relationship.[9] This is the logical premise that justifies the Court's intervention of its own motion, as the expression of a power-duty not designed to protect a particular contractual party, but rather to achieve an objective interest of the legal system, 'which becomes specific and concrete in the need for *"justice in each single case"* to be ensured by the trial'.[10]

Courts have not always endorsed such approach. Many subsequent rulings have indeed confirmed the traditional argument.[11] A Court of Cassation's (plenary session) ruling was thus needed which sharply confirmed this innovative approach in detail, and rejected all the exegetic-logic arguments against it, in order to affirm the scope and limits of the Courts' intervention.

The Court found no obstacle arising from Article 112 of the Italian Code of Civil Procedure since the provision related to the penalty clause (Article 1384 of the Civil Code) does not specifically require a party's objection, therefore the opposite solution can be traced from a systematic assessment of other similar

8 Court of Cassation, 24 September 1999, n 10511 (2000) I *Foro italiano* 1930.

9 Court of Cassation, n 3362/1989 (1989) I *Foro italiano* 2750, n 2503/1991 (on an omnibus surety) (1991) I *Foro italiano* 2077, n 6448/1994 (1995) I *Foro italiano* 188.

10 Court of Cassation, 24 September 1999, n 10511 (2000) I *Foro italiano* 1930.

11 Court of Cassation, 4 April 2003, n 5324 (2003) *Giustizia civile Massimario* 4; Court of Cassation, 30 May 2003, n 8813 (2003) *Giustizia civile Massimario* 5; Court of Cassation, 19 April 2002, n 5691 (2003) I *Giustizia Civile* 1075; Court of Cassation, 27 October 2000, n 14172 (2001) I *Foro italiano* 2924.

cases (Article 1526 and Article 1934 of the Civil Code). The Court held that any intervention of the Court's own motion should never be aimed at protecting a particular legal position, but rather a general interest shared in other cases where the corrective action of the Courts is provided for by the law (Article 2058 and Article 1226 of the Civil Code). In short, the Court addresses the party's autonomy and its limits that justify the Courts' corrective action. There are cases, the Court argued, where 'the correction of the parties' will' is provided by law, which automatically replaces the unfair contract term. There are other cases where automatic correction provided by the statutory rules is not possible 'since the performance due by one of the parties cannot be established in advance'. In such cases, 'the extent of the performance is left to the Court's decision in order to avoid cases where parties may use legal instruments to reach an objective that is not allowed by the legal system or that is not considered worth to be protected, as exemplified in the present case by the "manifestly excessive" penalty clause'.[12]

Therefore, the corrective power serves a specific purpose: to bring back the agreement, 'which is the result of the parties' freely expressed will, within the limits where it appears to be worthy to receive protection by the legal system.' This is fully consistent with the Court's power to hold by its own motion the non-conformity of a clause with the sources of an integrated legal system.

b) *Abuse of law*. The latter ruling mentioned above completes the picture[13] by establishing the theme concerning the abuse of law within the scope of objective good faith. It is worth recalling that the concept of objective good faith is epitomized by the constitutional value of social solidarity; it operates in the process of contract formation and execution, and it represents an instrument of control for the Court in order to ensure that 'the legal relationship is balanced and proportionate'.

There follows our first conclusion. The strictly formalistic conception maintained by the trial ruling under appeal must be rejected. Such an approach denies the Court's control over the act of autonomy (in that case, in connection with a contract withdrawal *ad nutum*), rules out the possibility that good faith may create autonomous obligations, and emphasizes, in a market economy, that the parties' autonomy should not be subject to a reasonableness control. The rejection of this approach by the Court of Cassation is very clear.

Abuse is a criterion suggesting bad faith and which demonstrates an 'altered use of the formal scheme of law, aimed at achieving further and different goals from those provided by the legislator'. Accordingly, an abusive conduct occurs

12 Court of Cassation (plenary session), 13 September 2005, n 18128 (2005) I *Foro italiano* 2985.

13 Court of Cassation, 18 September 2009, n 20106 (2010) I *Foro italiano* 85.

where 'in the connection between the power of autonomy... and its enforcement, the objective function of the act is altered with respect to the power that envisages it'. In such cases, the legal system does not provide any protection to rights and interests 'exercised in a manner that is contrary to objective good faith, and it prevents the achievement and retention of benefits arising from acts which, albeit instrumentally suitable, are exercised in such a way as to alter the function and being in contrast' with fairness. From all this, a principle arises, allowing Courts to assess whenever any act and conduct exceed the internal and external limits of the law. The method to adopt is also quite clear. In the case of conflicting interests, 'the proportionality of the means used' is essential, and requires 'a proceduralization of the enforcement of law'.

2 Fair judgments' in the Court of Cassation decisions

The Court of Cassation has been increasingly using the 'ordering principle of a fair judgment'.[14]

First of all, and this is quite innovative with respect to the past, according to this principle the trial court is responsible for declaring all types of voidness of its own motion since such assessments are based 'on the protection of general interests, fundamental values or values going beyond the interests of individuals'.[15] In other cases,[16] the Court makes a clear distinction between objections *stricto sensu*, which need to be raised by the party or otherwise they would be declared as inadmissible, and objections *lato sensu* which can be also raised by the Court by its own motion.[17] This has an important consequence.

14 See Court of Cassation (plenary session), 4 September 2012, n 14828 (2013) I *Foro italiano* 1238 and within the ECJ case law see European Court of Justice, 27 June 2000, case 240/98 *Océano Grupo Editorial SA* v *Roció Murciano Quintero* [2000], ECR 2000 I-04941; European Court of Justice, 6 October 2009, case-40/08, *Asturcom Telecomunicaciones SL* v *Cristina Rodríguez Nogueira* [2009], ECR 2009 I-09579; M. Ebers, 'ECJ (First Chamber) 6 October 2009, Case C-40/08, Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira – From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata' 18 *European Review of Private Law* (2010) 823–846.

15 Court of Cassation (plenary session), 7 September 2012, n 14828 *ibid*, ruling on the possibility of the Court to assess of its own motion the legal acts.

16 Court of Cassation (plenary session), 7 May 2013, n 10531 *ibid*.

17 Court of Cassation, ruling, 27 June 2014, n 14688, which referred the case to the First President for the eventual assignment to the plenary session in connection with a claim of a petition 'on the

'The system of objections is changing contract law',[18] providing the Court with the opportunity to automatically affect parties' autonomy in the light of the need to issue 'a *fair judgment*', thereby going beyond a rigid formalistic judgment anchored to the parties' claims. This is because the *fair judgment* standard 'operates as an assessment criterion' and puts into practice 'the obligation of the Judge to disclose all procedurally relevant facts for his decision, hearing both parties'.[19] Also in this case, the *reference to fairness is not alien to positive law; rather, it implies its correct implementation through a careful interpretation of procedural principles*. This has been confirmed by a very recent Court of Cassation (plenary session) ruling which can be seen as a real manifesto on this issue.[20]

This is a well-known issue. In the past,[21] Courts held that the possibility of raising by their own motion the voidness of the contract was required in the event of claims based on 'the performance or termination of the contract, but not with respect to other genetic defects', like claims for cancellation or rescission of the contract. There followed the interim order (27 November 2012) and the decision aimed at dealing, in all its aspects, with 'the problem of the relationship between raising ex officio contractual voidness and contractual claims, in order to reach a possible organic solution as a whole' that concerns both contractual voidness and the boundaries of the scope of judicial trials, both of which are key principles of the Court's control over contracts.

It is obvious that this decision has a considerable impact on many substantive rules[22] involving the Court's power to **hold a contract void** of its own motion;

question of the Court's right to automatically hold declare of its own motion the ineffectiveness of a contract entered into by a *falsus procurator*, in the light of the opportunity of reviewing the traditional approach which configures views such issue as an objection *stricto sensu* of the "pseudo-represented party"'.

18 S. Pagliantini, 'L'eccezione di inefficacia ex art 1398 nella fattispecie complessa della falsa rappresentanza' *Rivista di diritto civile* 6 (2014) 1429 *et seq*.

19 S. Pagliantini, 'La condizione di erede beneficiato come eccezione rilevabile di ufficio: l'opinione del civilista' *Persona e Mercato* 2013, 300; on this point, see also R. Oriani, 'Eccezione in senso lato e onere d tempestiva allegazione: un discorso chiuso?' I*Foro italiano* 2013, 3515*et seq*; A. Proto Pisani,*Lezioni di diritto processuale civile* (Naples: Jovene, 2014) 203 *et seq* and F. Cipriani, 'Il processo civile nello Stato democratico', in V. Garofoli (ed), *L'unità del sapere giuridico tra diritto penale e processo* (Milan: Giuffré, 2005) 109 *et seq*.

20 Court of Cassation (plenary session), 12 December 2014, n 26242; and Civil Court of Cassation (plenary session), 12 December 2014, n 26243; Pres Rovelli, Draftsman, 'Travaglino' (2015) *Giurisprudenza italiana* 70.

21 Court of Cassation (plenary session), 4 September 2012, n 14828 (2013) I *Foro italiano* 1253.

22 From the interplay with other appeals and special types of protecting voidness to the different forms of regularization of an invalid contract, from the resolution of the contract to the conversion of the void contract.

this holding is different from a mere **declaration** of voidness and from the following ruling's suitability **to become *res judicata***. In other words, the theme pertains to the relationship between substantial law and the trial and, in particular, between the contract and the trial.

There follows the key functional delimitation of voidness and of the scope of trial. *Both of these are affected by the attention paid to claims for substantive justice*.

Voidness has been brought back, against dispersive trends, to a unitary form of protection of supra-individual general interests through a judgment of disvalue. This applies both to cases of non-compliance with mandatory rules as well cases of non-compliance with the principles of public order and morality. It applies also to cases of structural illegality, given the public interest for a 'correct, ordered and reasonable' exercise of private autonomy. It additionally applies to cases of special voidness which express a general interest in securing a contractual balance and which, in turn, epitomizes a protective public order going beyond any distinction between a party's claim and an *ex officio* ruling of voidness. On this point, we need to make an important distinction that pervades the Court's reasoning. The *ex officio* **assessment** of the voidness issue is necessary – as it has been held by the ECJ[23] – and this must be distinguished from the **declaration** of voidness, which meets other needs and limits. This leads to a first conclusion. Bringing the different cases of voidness within the scope of a functional unit allows for the reaffirmation of the need to view the Court's mandatory and *ex officio* assessment of voidness as an indispensable guarantee of effective protection of fundamental values within social structures.[24] In addition, the scope of a judgment brings to light the functional values expressly recognized as the basic guide for juridical reasoning. The list is detailed and analytical: The substantial equivalence between law and trial; The stability of judicial decisions that eliminate tortuous steps and paths, thereby giving a final response to demands for justice; The harmonisation of the decision in order to avoid the breakdown of the unity of the substantial situation; The concentration of decisions; The effective protection against 'any formalistic interpretation that is unnecessarily tedious in relation to the time required for a judgment'; The principle of a fair trial pursuant to Article 111 of the Italian Constitution and Article 6 ECHR; Respect for

23 European Court of Justice, 4 June 2009, case 243/08 *Pannon*.

24 See also 12 December 2014, n 26242, *ibid*, point 3 from 1 to 15, 'the *ratio* of such establishment assessment is not that to eliminate, in all cases, the void contract from the scope of what is relevant in according to juridical terms; rather, it is to prevent that the contract may constitute this is the basis of for a jurisdictional judicial decision which somehow postulates allow for its validity or provisional ability to produce legal effects'.

the non-unlimited justice-resource, in addition to the principles of procedural loyalty and honesty and of formal equality of the parties.

Principles and values, which ultimately direct everyone to a result of the scope of a trial. The definitive consolidation of the substantial situation, which is directly or indirectly raised before the Court, leading to a decision characterized by *'stability, certainty, reliability over time, combined with the system values of celerity and justice'*. Also in this case, the conclusion is accurate and convincing. Going beyond its private or public law nature, the Court's judgment cannot but be affected by its functional dimension, which is that 'to attract within its scope ... the situation of a subjective right ... evaluated in its entirety, ie in relation to its total and actual substantial extent'. This has a clear consequence in the context of contractual claims. 'The judgment encompasses the contract in its dual nature of historical fact and programmatic situation as well as (with it) the legal-substantial relationship arising out of it'. This implies for the Court a duty to 'assess a possible ground for the voidness of a contract and to disclose it to the parties, throughout the trial, up to its conclusion'. A different matter is the declaration of voidness, which may not be mandatory, and the objective limits of the judgment. Lastly, the decalogue for the judge (7.1) is very clear, oriented by a conception of trials which is not 'excessively publicistic' but is rather guided by **the value of fair judgments**.

Reference is thus made again to the principles and values used in legal reasoning.[25] We thus need to examine these in detail, taking into account all the concerns and different opinions provided by scholars who have criticised Courts for an excessive deviation[26] or an improper generalization or[27] for the risks of adopting a reasoning that skips the necessary medium of a rule.[28]

25 S. Pagliantini, "Rilevabilià officiosa e risolubilità degli effetti: la doppia motivazione della Cassazione ... a mo' di bussola per rivedere Itaca". *I Contratti* 11 (2012) 874 *et seq*. See S. Pagliantini, 'Rilevabilità officiosa e risolubilità degli effetti: la doppia motivazione della Cassazione .a mò di bussola per rivedere Itaca' *I Contratti* 1 (2011) 113.

26 F. Busnelli, 'Verso una giurisprudenza che si fa dottrina. Considerazioni in margine al revirement della Cassazione sul danno da c.d. "nascita malformata"' *Rivista di diritto civile* 2013, 1527 and 1529.

27 V. Roppo, 'Causa concreta: una storia di successo? Dialogo (non compiacente, né reticente) con la giurisprudenza di legittimità e di merito' *Rivista di diritto civile* 2013, 957; R. Pardolesi, 'Un nuovo super-potere giudiziario: la buona fede adeguatrice e demolitoria' (2014) I *Foro italiano* 2041.

28 U. Breccia, 'Che cosa è "giusto" nella prospettiva del diritto privato?', now in U. Breccia, *Immagini del diritto privato, I, Teoria generale, fonti, diritti. Scritti* (Turin: Giappichelli, 2013) 288.

3 Contractual justice and the interplay between facts and values

With the publication of the book by John Rawls in 1971, the debate on justice received a new impulse and became a central theme in the public dimension of Western countries.[29] The underlying theory is well-known.

For a correct assessment of the conditions of a just society, Rawls uses 'the expedient of identifying the conditions which would be agreed on by parties acting under a veil of ignorance or lacking any information on the situation they will find themselves in once the agreement has been reached'. This is because ignorance fosters impartiality. This approach conveys the idea of justice as fairness, namely a cooperative activity supported by rules which Rawls draws from the most advanced results of social sciences, from moral philosophy to economics, and with game theory, rational choice theory, and theories of the needs of the Welfare State. His work, as is well known, led to a rebirth of political philosophy 'which resumed the central role it had ever had since Plato and Aristotle'.[30]

However, his underlying assumptions, which are the result of an enlightened liberalism, have been much debated. Criticisms concerned the equality principle, which has been perceived as a too fragile and formal concept, but most criticisms were principally directed toward the method intended to create a unitary and abstract model, in line with a certain philosophical tradition (Hobbes, Rousseau, Kant). Some influential authors[31] have criticized such constructivism and have followed another line of thought (from Condorcet to Bentham and Marx). The idea is that there is no institution or procedure capable of identifying a just social arrangement.

Contractual justice only evokes a balance within the content of a contract. Specifically on this point, for a number of reasons, legal scholars have always criticised the concept of a unitary idea.[32]

29 S. Grundmann, H.-W. Micklitz and M. Renner, *Privatrechtstheorie* (Tübingen: Mohr-Siebeck, 2015) and forthcoming in English (2016).

30 M. Ricciardi, *L'ideale di giustizia. Da John Rawls a oggi* (Geneva: EGEA, 2010) VII *et seq*.

31 A. Sen, *The Idea of Justice* (London: Penguin, 2009).

32 See H. Collins and with the Social Justice Group, 'Social Justice in European Contract Law: A Manifesto' (rapporteur with the Social Justice Group), 10 *European Law Journal* 653 (2004); and, on this point, for a comprehensive overview see H.-W. Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Cheltenham: Edward Elgar Publishing, 2011); V. Scalisi, 'Giustizia contrattuale e rimedi: fondamento e limiti di un controverso principio', in V. Scalisi, *Il contratto in trasformazione* (Milan: Guiffré, 2011) 337 *et seq*; G. Vettori, 'Giustizia e rimedi nel diritto europeo

The legislator has intervened in many fields in order to correct imbalances. Starting from the observation of this progressive legislative attention to the inequality of power between parties, scholars have begun dealing again with the Courts' control over contracts. Italian and European scholars have long debated this issue, outlining different options as to how this tension should be understood.[33] The reconstructions are clear and rigorous.[34] I wish to emphasize only one point.[35] The impression is that the arguments for protection are analyzed and reduced to the forms of the weak contractor and of the asymmetries of power. These arguments do not completely achieve their ambition. Justice cannot be claimed in the trials and in the contract for the protection of a particular party's interest; rather, only as an expression of a general interest and of a constitutional principle regulating, precisely, both the contract and the trial. Yet, the general interest cannot be solely an abstract principle.

Millenary wisdom, fixed in time by the 20th century Masters, shows us the right approach. Men can deal with absolute ideas, such as justice, only as from the time of their existence, from the time of their being. We are stuck in our time and existence which contains and establishes our need for justice. To understand it and correctly act, we need to start from concrete experiences of negation. Thus, once again, we need to commence from a particular time, though with one clarification.

Contemporaneousness does not mean full harmony with the present. It calls for much more: a non-coincidence. 'A unique relationship with one's own times, which adheres thereto but takes a distance therefrom'[36] to perceive their lights and shadows. So we need to reflect on today, its limits and on what extends beyond.

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dei contratti' *Europa e diritto privato* 2001 and now in G. Vettori, *Diritto privato e ordinamento comunitario* (Milan: Giuffré, 2009) 224 *et seq*.

33 See Scalisi, n 32 above, 337 *et seq*.

34 For a survey see E. Navarretta, 'L'evoluzione dell'autonomia contrattuale fra ideologie e principi' *Quaderni fiorentini* XLIII, 2014, 646. With reference to European contract law see S. Grundmann, 'Information, party autonomy and economic agents in european contract law' *Common Market Law Review* 39, 269–293 (2002).

35 All this leads to the conclusion that the autonomy of private parties is not declining; rather, it can be an instrument and factor for the transformation of institutions in its ability to direct political and economic decisions of the time, see U. Breccia, 'Autonomia contrattuale, Dei contratti in generale' in E. Navarretta and A. Orestano (eds), E. Gabbrielli (dir), *Commentario del codice civile* (Turin: UTET, 2011) 67.

36 G. Agamben, *Che cos'è il contemporaneo?* (Rome: Nottetempo, 2008) 9 *et seq*.

We are still immersed in a difficult context which escapes definitions.[37] We live in an era that has been overwhelmed by technological and scientific advances, often lacking political and cultural bearings. It is an era that has learned to live with the crisis of the economy, of ideologies and militancy, with the triumph of neoliberalism and its profound deficiencies.

The last decade of the 20th century began with the announcement of the end of history, after the fall of the Berlin Wall, and pushed its shadow into the present, even if dispersed in a magma with no name, yet with defined anthropological segments. Between the two centuries and the two millennia, collective claims progressively died down and full dignity was given to 'being yourself' (one's selfishness), as a program of life and as a final goal exalted by reality shows, social networks and visual arts.[38]

However, after the momentous events of the end of the century, the decline of post-modernity is evident, emerging from any science and artistic perception.

Philosophy goes beyond nihilism and content indifference to rely on a realism that is attentive to the changes and consolidations of the present.[39] The jurist is less and less satisfied with his allegiance to language and procedures. The jurist looks for the partial truth of his time, capable of directing and determining the work of the interpreter, increasingly influenced by an objectivity that is linked to a concrete dimension of the present and of the existence.[40] Literature and visual arts anticipate the future, as so often happens.

The former abandons the influences of post-modernism to go back, immersing itself in the concreteness of historical and social context. The reason for this is clear. 'In an age of material contradictions like the present one, with its political and economic urgencies, the idea that there exists only a language has been questioned: the time of lightness, of cheerful nihilism no longer makes sense. We assist in a return of the themes of neo-realism which had other roots; yet a new realism and a new modernism resulting from early 20th century

37 From 1980s neoliberalism to the rising of European principles. From the centrality of competition to the constitutionalisation of personal values and of a social market economy. From the legal effectiveness of the Charter of Nice-Strasbourg to the Fiscal Compact that weighs heavily on the content and the guarantee of the subjective situations of private parties.

38 This is summarized in the representation of the unmade and dirty bed of Tracy Erminn, exhibited for the first time in 1999 and recently sold for over two million euros by Christie's. In that symbol of an era there lies an intimate piece of the author's life as a fragment of subjectivity that binds things and feelings, without any claim of objectivity since attention is given, as a trait of the time, to 'emotions, what is genuine and not artificial'.

39 In particular, M. Ferraris, *Manifesto del neorealismo* (Rome-Bari: Laterza, 2012).

40 See the bright and enlightening essays by G. Benedetti, *L'oggettività esistenziale dell'interpretazione* (Turin: Giappicchelli, 2014).

Europe[41]'. After post-modernism, focus on the narrative, crime and *noir*, the transition to a new era (of hyper-modernism) has deeply different traits. Despite the diversity of inspirations, 'the method is always giving voice to reality and experience', to the material world with its emotions and traumas, where good and evil return to be perceived and isolated as such.[42]

Contemporary art, in its best expressions, tells and explains present dramas with an emotional and engaging language. From the roots of the current economic crisis to the shattering of intermediate communities, such as the family, it always focuses its attention on the concrete reality of an ever-changing world.[43]

In this crushed social reality, the same forms of political democracy continuously fluctuate within an unstable balance between representation and participation. We talk about 'live' democracy,[44] 'individual hegemonies' or 'hybrid and personal democracy', dominated by TV and Internet.[45] This is a phenomenon that has deep roots, not only in Italy.[46]

What happens to the sources of private law is rather clear. We are progressively shifting from a system of rules and structures requiring conformity, to a scenario where priority is given to internal constitutional principles and community principles. Norms, which often lack a situation required by law and which do not allow for a judgment of conformity to a given rule, require instead the balancing of different values. The axis of legalism moves from the absolutism of law to the centrality of the interpreter. What is more, law is more and more written and rewritten by different subjects: legislators, judges, Authorities, scholars, private persons. This has many merits though it also implies a serious risk, namely the erosion of a value of civilization: the certainty of law. What should we do?

From this division springs a thoughtful reflection on how to apply rights, principles and general clauses. The bases of this reflection are legal sources diversifying the subjective positions of private persons and inducing us to per-

41 R. Luperini, *Tramonto e resistenza della critica*, (Macerata: Quodlibet, 2014).

42 Luperini, n 41 above, and P. Di Stefano, 'Addio al postmoderno, la narrativa è realistica' *Il Corriere della sera* 20 August 2014.

43 The activity performed in Florence by the Centre for Contemporary Culture Strozzina in Palazzo Strozzi, is very significant. The exhibition on the 'American Dream' showed how the housing bubble caused the global recession, just like the recent exhibition 'Family matters' told, in the most convincing way, about the hyper-modern reality of family collectivity. See on this point C. Saraceno, *Coppie e famiglie. Non è questione di natura* (Milan: Feltrinelli, 2012); P. Ginsborg, *Famiglia novecento* (Turin: Einaudi, 2013).

44 N. Urbinati, *Democrazia in diretta* (Milan: Feltrinelli, 2013).

45 I. Diamanti, *Democrazia ibrida* (Rome-Bari: Laterza, 2014).

46 Kennedy, n 3 above; D. Kennedy and M. Chantal, 'Europe-building through private law: lesson from constitutional theory' (2012) *European Review of Contract Law* 326 *et seq*.

ceive the differences and the originating source of inequality. This is made possible by a new and rigorous argumentative technique.[47]

The theme of contract justice lies precisely here.

4 Fair trial and the right to an effective remedy in the European Courts system

As it has been observed, we need to distinguish two complementary yet not coincidental issues within both internal and EU sources. On the one hand, the right to an effective action requires the 'ability to take action' through effective judicial protection, that is, a protection deprived of any anomaly or preclusion that empties the substantial situation (Article 10 of the Universal Declaration of Human Rights (1948), Article 6 ECHR, Article 47 CFREU). On the other hand, the right to an effective remedy, allowing the individual to obtain in Court all the benefits granted by the protected interest[48] (Article 24 of the Constitution, Articles 6 and 13 ECHR, Article 47 CFREU).

The first issue involves a guarantee of the minimum conditions of the effectiveness of a trial: a trial should take place within a reasonable period of time, it should be conducted by an independent and impartial tribunal, both parties should be heard and ensured the right of defence.[49] The second issue calls for a reflection and an adjustment of the forms of protection: protection should guar-

47 M. Kumm, 'Who is afraid of the total constitution? Constitutional rights and principle and the constitutionalization of private law' *German Law Journal* 2006, 341–370.

48 S. Caporusso, 'Effettività e ragionevolezza della tutela giurisdizionale nel canone dell'art 6, par 1, CEDU' *Persona e Mercato* 2014, 118 *et seq*; N. Trocker, 'Il diritto processuale europeo e le "tecniche" della sua formazione: l'opera della Corte di Giustizia' *Europa e diritto privato* 2010, 361 *et seq*; N. Trocker, *La formazione del diritto processuale europeo* (Turin: Giappichelli, 2011) 171 *et seq*; L.P. Comoglio, 'Giurisdizione e processo nel quadro delle garanzie costituzionali' *Rivista trimestrale diritto processuale civile* 1994, 1070 *et seq*; L.P. Comoglio, 'Il "giusto processo" civile nella dimensione comparatista' *Rivista di diritto processuale* 2002, 728 *et seq* and D. Dalfino, 'Accesso alla giustizia, principio di effettività e adeguatezza della tutela giurisdizionale' *Rivista trimestrale diritto processuale civile* 2014 (3) 907 *et seq*; N. Półtorak, *European Union Rights in National Courts* (Alphen aan den Rijn: Wolters Kluwer, The Netherlands, 2015) especially 39–100; C. Mak, 'Rights an Remedies', in H.-W. Micklitz (ed), *Constitutionalization of European Private Law* (Oxford: Oxford University Press, 2014) 236–259; N. Reich, 'The Principle of Effectiveness and EU Private Law', in U. Bernitz, X. Groussot and F. Schulyox (eds), *General Principles of EU Law And European Private Law* (The Hague: Wolter Kluwer, 2013) 301–326.

49 For a bright and deep synthesis, see Caporusso, n 48 above, *ibid*. For a review of the case-law of the ECHR, see F. Edel, 'The Length of Civil and Criminal Proceedings in the Case-law of the

antee in Court the full satisfaction of every protected right and interest.[50] We now need to further ponder on the latter principle because of the delicate and topical nature of this issue, which concerns us closely.

Suffice it to think that – as a result of the work of scholars and of the Courts – effectiveness has been extended to protect not only the access mode to and course of the trial, but also the potentialities of the situations to be fully satisfied. This further extension is obtained by removing all substantive and procedural hindrances.[51] In this way, the right to an effective action has been progressively construed as '*the right to an effective remedy*'.[52] This implies that a just trial (Article 111 of the Italian Constitution) and a fair trial (Article 6 ECHR and Article 47 CFREU) cannot be separated from substantive protections. Substantive and procedural protections need to be reviewed together, balancing interests and values because 'just and fair ... are qualifications that cannot exhaust themselves by referring to the principle of legality; rather, they recall ... the system of values underlying the rules'.[53]

In essence, the principle of effective judicial protection developed by European Courts requires identifying and reconstructing the most adequate protection of the substantive interest.[54] This includes the possibility of choosing remedies and of their accumulation, provided specific circumstances are met.[55] And the reason why this is needed is clear.

The right of access to a Court enshrined in Article 24 of the Italian Constitution needs to be coordinated with Articles 2, 3 and 4. These provisions require the identification of a concrete and differentiated content for the protection of the

European Court of Human Rights', Council of Europe Publishing, available at http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-16(2007).pdf.

50 On the instrumental nature of trial, A. Proto Pisani, 'Appunti preliminari sui rapporti tra diritto sostanziale e processuale', in *La tutela giurisdizionale dei diritti* (Naples, 2003) 1 *et seq*.

51 N. Trocker, 'Dal giusto processo all'effettività dei rimedi: l''azione' nell'elaborazione della Corte europea dei diritti dell'uomo' *Rivista trimestrale diritto processuale civile* 2007, 35 *et seq*. P. Biavati, *Europa e processo civile. Metodi e prospettive* (Turin: Giappichelli, 2003) 62. As a significant precedent, see M. Cappelletti, 'Accesso alla giustizia come programma di riforma e come metodo di pensiero' *Rivista di diritto processuale* 1982, 233 *et seq*.

52 Dalfino, n 48 above, 917 and his reference to ECJ case law, 15 May 1986, case 222/84, *Johnston*; 19 June 1990, case 213/89 House of Lords, especially Point 21, (1992) IV *Foro italiano*, c 498; 25 July 2002, case 50/00 and EU Tribunal, sec II, 3 March 2011, n 110–07.

53 Dalfino, n 48 above, 918.

54 N. Trocker, 'La Carta dei diritti fondamentali dell'Unione europea ed il processo civile', in Trocker (2011), n 48 above, 107, 126 *et seq* and V. Varano, entry Remedies, *Digesto discipline privatistiche, sezione civile* XVI, Turin, 1997, 571 *et seq*.

55 Dalfino, n 48 above, 927 who mentions Articles 1218, 2058, 1453, 2740 Italian Civil Code and 185 Italian Criminal Code.

right to access to a Court that cannot be satisfied by the twin concepts of specific protection and protection by way of equivalent measures. This is precisely because a trial should give 'the right-holder everything that and exactly what he is entitled to obtain'.[56]

It remains to be precisely spelled out how the right to an effective remedy must be reconstructed and implemented.

In the past, the Italian Constitutional Court did not give a clear interpretation of Article 24 of the Constitution, so that it was difficult to identify 'the actual scope of the constitutional coverage, to establish whether it concerned only the right to a "fair trial" ... or "also the right to an effective [substantive] protection"'.[57] Yet, the Court has recently and clearly affirmed its approach. The occasion was the declaration of the unconstitutionality of international rules on State immunity[58] against an action for damages.

In ruling on this matter, the Court established an inseparable link between the right to take action (Article 24 of the Constitution) and personal inviolable rights. What is more, the former article was qualified as one of 'the greatest principles of juridical civilization'; the Court also established the existence of an effective dimension of inviolable rights manifesting itself 'in effective protection ... via the Courts'.[59] To clarify the meaning of such effective protection, there are two starting points: the concept of a legally protected interest, which is the core of subjective rights;[60] the meaning of the effectiveness of protection.[61]

Let us discuss the first starting point.

The protection of an interest has to open 'all the paths for legal protection, in accordance with the universal criterion of adapting effects to the substance of the interests expressed by the legal fact'.[62] The Court of Cassation has insisted on this point, opening up the way for the compensability of, most notably and among others, legitimate interests. This conclusion can be reached by a correct characterization of legal relevance and of remedies. On the first aspect, it is well-known that the *juridical essence of a fact* – that is, its relevance for law – must be kept

56 G. Chiovenda, *Principi di diritto processuale civile* (Naples: Jovene, 1980) 81.

57 I. Pagni, *Tutela specifica e tutela per equivalente* (Milan: Giuffré, 2004) 56.

58 See Constitutional Court n 238/2014 and, on this point, D. Imbruglia, 'L'azione di risarcimento per fatti illeciti degli Stati e il principio di effettività della tutela giurisdizionale. Notes on the Court's sentence n 238/2014' *Persona e Mercato* 2014, 163 *et seq*.

59 Imbruglia, n 58 above.

60 A. Falzea, 'Gli interessi legittimi e le situazioni giuridiche soggettive' *Rivista di diritto civile* 2000, 683 *et seq*, but also the very famous Court of Cassation, 22 July 1999, ruling n 500/1999 (1999) I *Foro italiano* 3201.

61 Comoglio (1994), n 48 above, 1076 *et seq*. Quoted by Pagni, n 57 above, 57.

62 Pagni, n 57 above, 59.

separate from effectiveness. The different conceptual reconstructions put forward do not change this conclusion.[63] The *juridical essence* guides and defines the substantive protection of a subjective situation.

We need to start afresh precisely from here by coordinating such essence with a new context of sources.

Suffice it to recall that, more than ten years ago, attention was given to the features of diffused normativity, as the prelude for the advance of law by principles.[64] This has a clear consequence: 'The traditional system of legal sources "is nebulised" and the interpreter must deal with a widespread normativity, which calls for the integration of facts and principles having' the traits of normativity and for the need to confront 'the experience, the practice, the interests at stake'. This is for an obvious reason. Only then can the process 'unveil the social foundations of positive law' and, 'in certain respects, contribute to connect validity with effectiveness'.[65]

The notion of effectiveness confirms this conclusion.[66]

This principle, at this stage of the legal order, *is at the basis of the conversion process of facts into law, as shown by a series of objective data*.[67]

The radical change in the system of legal sources progressively gives it a positive value while at the same time changing legal dynamics. This is proven by (in addition to the rules enshrined in the Italian Constitution and in European texts) the rule contained at the beginning of the Italian Code of Administrative Justice, where reference is made to a jurisdiction which should ensure 'full and effective protection according to the principles of the Constitution and of European law'.

Further confirmation has been given by recent Constitutional Court rulings where Articles 2 and 24 have been systemically construed, as said above, to ensure the effective protection of not only the right to bring an action but also to

63 For a synthesis on this point, see G. Vettori, *Contratto e rimedi* (Padua: Cedam, 2009) 378. And the reference to A.E. Cammarata, *Formalismo e sapere giuridico: studi* (Milan: Capelli, 1963) and especially 'Il significato e la funzione del "fatto" nell'esperienza giuridica' 245 *et seq*.

64 G. Berti, 'Diffusione della normatività e nuovo disordine delle fonti del diritto' *Rivista diritto privato* 2003, 460 *et seq*. See also P. Grossi, *Introduzione al Novecento giuridico* (Rome-Bari: Laterza, 2012); G. Silvestri, *Dal potere ai principi. Libertà ed eguaglianza nel costituzionalismo contemporaneo* (Rome-Bari: Laterza, 2009).

65 Berti, n 64 above, 462–464.

66 See G. Vettori, 'Controllo giudiziale sul contratto ed effettività delle tutele. Una premessa' *Nuove Leggi Civili Commentate* 2015, 151 *et seq*.

67 P. Piovani, entry Effettività (Principio di), in *Enciclopedia del diritto* (Milan: Giuffré, 1965) 421 *et seq*.

substantive remedies. This should be achieved with a flexibility ... that is typical of common law remedies[68] on the basis of provisions (Articles 2 and 24 Constitution, Articles 6 and 13 ECHR and Article 47 CFREU)[69] calling for the enforcement, in Europe, of the expectation of an effective remedy, intended as the claim for appropriate instruments of protection and suitable procedural configurations ensuring the full satisfaction of the protected interest[70] and reducing[71] "the distance gap between the means of protection and the interest or good that needs to be protected".[72]

We can thus understand how the principle of effectiveness is becoming a key rule of the constitutional system,[73] both domestic and European.[74] Around this pivot, rotate both the dynamics of protection of private persons[75] and the con-

68 Comoglio (1994), n 48 above, 1076.

69 On this point, see the nice essay by N. Trocker, 'L'art 47 della Carta dei diritti fondamentali dell'Unione Europea e l'evoluzione dell'ordinamento comunitario in materia di tutela giurisdizionale dei diritti', in G. Vettori (ed), *Carta Europea e diritti dei privati* (Padua: Cedam, 2002) 381 *et seq*, And especially Pagni, n 57 above, 54 *et seq*.

70 U. Mattei, 'I Rimedi, in Il diritto soggettivo', in R. Sacco (ed),*Trattato di diritto civile* (Turin: UTET, 2001) 105 *et seq*; A. Di Majo, 'Il linguaggio dei rimedi' *Europa e diritto privato* 2005, 341 *et seq*; A. Di Majo, 'Adempimento e risarcimento nella prospettiva dei rimedi' *Europa e diritto privato* 2007, 2 *et seq*; D. Messinetti, 'Sapere complesso e tecniche rimediali' *Europa e diritto privato* 2005, 605 *et seq*; P.G. Monateri, *Ripensare il diritto civile* (Turin, 2006). For a review of the CJEU case-law on National remedies, see M. Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Portland: Hart, 2004) 227 *et seq*.

71 A. Di Majo, *La tutela civile dei diritti* (4th ed, Milan: Giuffré, 2003) 13 *et seq*; Di Majo (2005), n 70 above, 342 *et seq*.

72 Di Majo (2005), n 70 above, 355.

73 ECHR 31 May 2011, *Maggio ed altri* v. *Italia*, (2011) *Foro italiano*, entry *Diritti politici e civili*, n 177; Constitutional Court, 28 November 2012, n 264 (2013) I *Foro italiano*, with notes by R. Romboli and G. Amoroso, and *ibid*, 788 with a note by E. Scoditti, 'Se un diritto umano diventa diritto fondamentale: la CEDU come parametro interposto di costituzionalità', and by M. De Luca, 'Quanto incide l'allargamento dei controlimiti sulla efficacia delle norme CEDU'; Court of Justice, Grand Chamber, 26 February 2013, case 399/11 *Melloni-Ministero Fiscal*; on this ruling, see the comment by A. Ruggeri, 'La Corte di Giustizia, il primato incondizionato del diritto dell'Unione e il suo mancato bilanciamento col valore della salvaguardia dei principi di struttura degli ordinamenti nazionali nel loro fare "sistema"', in www.diritticomparati.it; R. Conti, 'Mandato di arresto europeo ed esecuzione di una pena irrigata in absentia' *Corriere Giuridico* 4/2013, 8; R. Conti, 'Da giudice (nazionale) a Giudice (eurocomunitario). A cuore aperto dopo il caso Melloni', in www.europeanrights.eu.

74 European case law is very extensive; see the recent ECJ, 30 September 2003, case 224/01, point 58; ECJ, 12 December 2006, case 446/04, points 203 and 219; ECJ, 17 April 2007, case 470/03, point 123; ECJ, 23 April 2008, case 201/05.

75 G. Vettori, 'Validità, responsabilità e cumulo dei rimedi. On the case Cir-Fininvest' *Persona e Mercato* 2013, 279, in www.personaemercato.it.

creteness of remedies that are, – precisely – effective.[76] Therefore, the definition of effective protection mechanisms is a primary instrument of this new integrated order, governed by principles and values. We need to further ponder on this issue.

5 The new techniques of legal reasoning

Scholars have already warned us that to argue on the basis of principles means to overcome the analogical or typological method itself,[77] which is the way in which the interpreter participates nowadays in the positivization of rules and of mechanisms of protection. This requires us to acknowledge an objective fact.

'Law lives on rules and consolidated precedents, law-makers and Courts, all called to balance interests, to interpret rules within the framework of principles, to disapply National laws in order to implement Community sources'. So much so that rules are written and re-written by different players, 'among which it is often difficult to determine who commands and who obeys'.[78] Therefore, unless we want to undermine the value of certainty, we need to engage – in a new and difficult way – in the creation of a new system tailored to present times. This requires at least two immediate tasks. On the one hand, rethinking rights, private autonomy, the controls for giving them fullness and effectiveness in a general context that has profoundly changed; on the other hand, examining how their regulation can help to contain and overcome the effects of the crisis in order to define the new contours of a regulation of private relationships in tune with the times.[79] From the above stems the role of the interpreter as a protagonist in the

76 P. Grossi, 'Diritto canonico e cultura giuridica' *Quaderni fiorentini* 3 (2003) 380–381: 'the particular/universal dialectic is very strong in canon law and the value given to particulars is considerable: the sin cannot but be the single sin of the single individual and law cannot but be the efficient remedy intended to prevent, alleviate, penalize that specific sin'.

77 A book on mortgages has recently inspired a refined and erudite dialogue on how to adapt the conservatism of some traditional sets of rules which, while are essential for legal dynamics, yet are governed in a manner that is nowadays inappropriate, causing uncertainties and discontent whenever the legal discourse 'appears somehow unsatisfying and calls for a critical review'. See Baralis and Spada, 'Dialogando su dogmatica giuridica e giurisprudenza (dopo aver letto un libro sull'ipoteca)'*Rivista diritto privato* 2013, 1 *et seq* and, on this point, Vettori, n 66 above, 151 *et seq*. For a theoretical discussion, see R. Alexy, 'Two or Three?', in M. Borowski (ed), *On the Nature of Legal Principles* (Stuttgart: Steiner, 2010) 9–18.

78 A. Punzi, Prefazione al volume di Benedetti, n 40 above, XV *et seq*.

79 M. Fioravanti, 'Cultura costituzionale e trasformazioni economico-sociali: l'esperienza del novecento', in R. Bifulco and O. Roselli, *Crisi economica e trasformazioni della dimensione giuridi-*

search for the hard core of law we are called upon to apply every day. A law in which the rule should be the objective response to expectations of justice, without falling from above; rather, it is an 'invention of reason and of the wise artfulness of the best argument',[80] built into the density of the Court's opinion. In short, if the careful search for sources grounding the decision satisfies the need for objectivity, the subjectivity of the interpreter (*confined in his being here and now*) requires prudence and enlightenment, that is, knowledge and wisdom. Only in this way his decision will be credible and the precedent will be passed on.

Luigi Mengoni has clearly indicated the terms of this new task of the jurist. 'The moral principles enshrined in the Constitution in the shape of fundamental rights ... acquire legal nature ... without losing their original status. They belong at the same time to law and ethics' but they are subject to 'the manners, procedures and constraints of legal argumentation'.[81]

These new ways, procedures and constraints concern essentially three aspects: the relationship between facts and values, the contemporary meaning of a systemic method, the dialogue between legal science and judicial practice for the creation of a true 'doctrine of the judicial precedent'[82] in that new 'case-by-case approach' that is typical of legal argumentation. We will now briefly discuss all these aspects.

a) The relationship between facts and values

'The long-standing battle conducted by legal positivism to expel the idea of justice from any theoretical thinking of law is grounded in the dualism between factual judgements and value judgements. Justice is believed to be a value judgement expressing a subjective vision which, as such, is neither useful nor usable. But this prohibition to discuss issues of justice is based on the misconception that all value judgements always lack a rational foundation. This belief is

ca (Turin: Giappichelli, 2013) 13 *et seq*. H.-W. Micklitz and D. Patterson, 'From the Nation State to the market : the evolution of EU private law as regulation of the economy beyond the boundaries of the Union?', in B. Van Vooren, S. Blockmand and J. Wouters (eds),*The EU's Role in Global Governance: the Legal Dimension* (Oxford: Oxford University Press, 2013) 59–80.

80 Benedetti, n 40 above, 33 *et seq*, 69 *et seq*,103 *et seq*, 223 *et seq*, 241 *et seq*.

81 L. Mengoni, *Diritto e tecnica* (Rome-Bari, 2001); now in C. Castronovo, A. Nicolussi and A. Albanese (eds), Luigi Mengoni, *Scritti I, Metodo e teoria giuridica* (Milan: Giuffré, 2011) 47. This passage is quoted by Irti, n 3 above, La crisi ..., 41. The essay 'Diritto and Valore' by Mengoni is available in English in the forthcoming English edition of Grundmann, Micklitz and Renner, n 29 above.

82 L. Mengoni, 'I principi generali del diritto e la scienza giuridica', in Accademia Nazionale dei Lincei,*I Principi Generali del Diritto* (Rome: 1992) 328.

erroneous; it is precisely that prohibition which has no rational foundation since it is a dogma without justification, imposed by positivism for far too long'.[83]

The vagueness of the concept requires us to clarify its meaning but does not justify the prohibition. No supposed scientific objectivity can prevent us from speaking of a type of law where interpretation and interpreters are central, the latter being capable of arguing not only with the standard of conformity to a rule but also via criteria of correctness, reasonableness, proportionality.[84]

On the one hand, it expresses the need for 'the correctness of practical reasoning[85] ... always taking account of practical experience, common good sense ...[86] so that reasonable becomes a synonym for circumspection, weighing, balancing through equilibrium, but also justice'.[87] On the other hand, it has an elusive character, that is difficult to define.[88] Recent Constitutional case-law can help us greatly in this respect.

In defining the power of the law-maker to set retroactive rules, the Court expects that this action must be able 'to find an adequate justification in the need to protect principles, rights and goods of constitutional importance, which represent "imperative reasons of general interest" according to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)'.[89] What is more, retroactive provisions – the Court adds – must find 'an adequate

83 E. Gliozzi, 'L'opposizione dei giudizi di fatto ai giudizi di valore: critica di un dogma giuspositivista' *Rivista trimestrale diritto processuale civile* 3 (2014) 857 *et seq*, but also H. Putnam, *Fatto/valore. Fine di una dicotomia* (Italian translation, Rome: Fazi editore, 2004) especially XIV, 6–7, *ibid* 'this book attempts to demonstrate that the two dichotomies "factual judgements and value judgements" and "factual truth and analytical truth" have corrupted our thinking both in the field of ethical reasoning and in the description of the world, preventing us from seeing **how evaluation and description are intermingled and interdependent**'.

84 Bright and enlightening comments are made by Grossi, n 2 above. On the concept of proportionality, see R. Alexy, *A Theory of Constitutional Rights* (Oxford and New York: Oxford University Press, 2002), English translation of *Theorie der Grundrechte* (Baden-Baden: Nomos, 1985) and A. Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012).

85 M. La Torre, 'Introduzione', in M. La Torre and A. Spadaro (eds), *La ragionevolezza del diritto* (Turin: Giappichelli, 2002) 3. See also S. Bertea, 'A Foundation for the Conception of Law as Practical Reason'*Law and Philosophy* 34 (2015) 55–88.

86 A. Morrone, 'Principio di ragionevolezza come principio architettonico del sistema', in La Torre and Spadaro (eds), n 85 above, 231 *et seq*.

87 G. Scaccia, *Gli 'strumenti' della ragionevolezza nel giudizio costituzionale* (Milan: Giuffré, 2000) 14–15. See also R. Alexy, 'The Reasonableness of Law', in G. Bongiovanni, G. Sartor and C. Valentini (eds), *Reasonableness and Law* (Dordrecht: Springer, 2009) 5–16.

88 Grossi, n 2 above, *ibid*, where these opinions are commented upon.

89 Constitutional Court, 28 November 2012, n 264.

justification at the level of reasonableness' and must not conflict 'with other values and interests protected by the Constitution, so that no arbitrary affecting the substantive situations put in place by the previous laws'.[90] In other words, one has to balance potential retroactivity with 'the principle of reasonableness (which is redundant in the prohibition to introduce unjustified disparity of treatment)' and with the protection of legitimate expectations as a principle inherent to the Rule of Law; the consistency and certainty of the legal ordering; the respect of the functions constitutionally reserved to the judiciary.[91]

The constraints of legal argumentation. On the other side, the definition of the manner and of the constraints of legal argumentation are within the full scope and responsibility of legal science which, in balancing values, must circumscribe the Courts' discretion, positivize values and build a doctrine of precedents.[92] This should be done in a dialogue with case-law that should differ from the past.

A few decades ago, Francesco Galgano had the merit of starting a dialogue on the rules to be applied; yet, we now need something more, something different. 'Legal reasoning is now pursuing other paths ... values do not need to be required by law ... because they are worthy in themselves and applicable wherever they are invoked and claimed ... the event is no longer confronted with a situation required by law ... rather, it is confronted with values ... rules are no longer enough in themselves; rather, they are supported by something else, something that can somehow make use of them ... the theory of values has erased from our debate the problem of gaps'.[93]

There are numerous examples of this in both domestic and Community European law. The invitation made by the Constitutional Court to apply Article 2 of the Italian Constitution directly, for the purposes of the nullity of a contractual clause, and together with the wide delimitation of the *off-the-record relevance ex officio* applicability of this remedy, is a first example.[94]

Besides, the possibility of claiming bad faith in negotiations relating to a valid contract and the tort action to protect a contractual position damaged by an illicit conduct, extend the scope of compensation.[95]

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90 Constitutional Court, n 432/1997, Constitutional Court, 30 January 2009, n 24/2009; Constitutional Court, n 74/2008 and n 376/1995.

91 Constitutional Court, n 103/2013; n 209/2010; n 6/1994.

92 Mengoni, n 82 above, 326–328; B. Schlink, 'Proportionality (1)', in M. Rosenfeld and A. Sajó (eds),*The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 719–738, especially 724.

93 Irti, n 3 above, La crisi ..., 42–43. Irti, n 3 above, Calcolabilità ..., 87 *et seq*.

94 Constitutional Court, ruling n 77/2014, see paragraph 1.

95 Vettori, n 75 above, and in *Danno responsabilità* 2014, *ibid*. H.-W. Micklitz, *The Politics of Judicial Co-operation in the EU: Sunday Trading, Equal Treatment and Good Faith* (Cambridge:

Lastly, the rulings on the effectiveness of compensation, on consumer actions and on prescription limitation periods, induce us to re-think several sets of rules.[96]

b) The techniques of Community European law

As regards Community European law and its impact on domestic law, the latest innovations are even more significant. In seeking an effective remedy, it is very evident that there is a tension towards a system to be built in a dialogue between rules and judges, which is very evident. This occurs with a focus on single cases, which can be the sole source of elements of response and general guidance. This reveals the importance of interpretation and application techniques.

a) The inapplicability of incompatible internal rules, despite being upheld by recent rulings, is rigorously delimited.[97] A directive, even if clear, precise and unconditional and intended to confer rights and obligations, cannot generally be applied in a dispute between private individuals *per se*. On the other hand, a rule that contains a legal norm[98] containing a right or a principle (which, to produce its effects, must be specified by domestic and Community European provisions) cannot be invoked for non-application purposes.[99]

b) The reference for a preliminary ruling appears to be a widespread control in the hands of the judge. Such a reference is not necessary for trial courts generally and for courts of last resort when the solution is self-evident or the problem has already been settled by the Court of Justice of the European Union.[100]

Cambridge University Press, 2005) 292–423 explores the use of good faith by UK and German Courts in consumer contracts.

96 D. Imbruglia, 'Il giudice comune e il principio di effettività della tutela giurisdizionale: note a margine della sentenza della Corte di Cassazione n 21255' *Persona e Mercato* 2014, 55; Imbruglia, n 58 above; M. Mauro, 'Prescrizione ed effettività nel dialogo fra Corti italiane e Corti europee' *Persona e Mercato* 2014, 139; F. Della Negra, 'Il controllo d'ufficio sul significativo squilibrio nella giurisprudenza europea' *Persona e Mercato* 2014, 71; F. Della Negra, 'The Uncertain Development of the Case Law on Consumer Protection in Mortgage Enforcement Proceedings: Sánchez Morcillo and Kušionová' *Common Market Law Review* 52 (2015) 1009–1032.

97 ECJ, 15 January 2014, case 176/12, *Association de médiation sociale*.

98 This limitation does not apply to State-owned companies and to exhaustive lists of compulsory requirements established by a Directive; see ECLI:EU:C:1990:313 (*Foster case*) and ECLI:EU:C:1990:395 (*Marleasing case*). For an analysis, see S. Grundmann, *European Company Law* (Portland: Intersentia, 2012) 94–97.

99 ECJ, 26 February 2013, case 617/10 and 15 January 2014, *ibid*.

100 ECLI:EU:C:1982:335 (*CILFIT I case*). See the commnet by Former Justice Edward available at http://www.hadjimichalis.gr/keimena/ccbe1/Documents/rapport%20D%20Edward.pdf.

It must be applied in the other cases, and this requires full knowledge of Community European law by trial Courts and especially by Cassation Courts.[101]

c) Conforming interpretations acquire increasing importance and accuracy. Domestic rules are to be applied in the light of the wording and purposes of the Directive (or of the principle) to reach an (interpretative) solution that conforms to the objective pursued by these sources. There ensues the reconstruction of a rule via interpretation.[102]

d) The ECHR control over social rights and budget limits takes on a meaning of great guiding importance on which we need to ponder.[103]

What is more, the Court has recently criticized the power of the Liquidator to cancel a preliminary contract pursuant to Article 72 bis of the Italian Bankruptcy Law. Italian Courts, states the opinion, are entitled 'only to examine the formal legality of the disputed measure, without dealing with its needs and proportionality in the light of the principles set out in Article 1 of Protocol 1 of the Convention'. Therefore, this option rule is deemed contrary to Article 13 ECHR '*because the Italian legal system has not offered the applicant sufficient safeguards against arbitrariness and the person concerned has not had at its disposal an effective remedy to enforce its grievance at the national level*'.[104]

The above rulings suffice to observe that the principle of effectiveness of judicial protection is an instrument for the order and reduction of the complexity of private law which requires today, as when it originated at its origins, the wise work of laws -makers and the Courts and judges.[105]

6 Contemporaneity and legal certainty

We need to acknowledge the historicity of the value of certainty and deal with the problems of a new and different type of law. A law 'increasingly less legal' and

101 ECHR, 8 April 2014, Dhahbi-Italy. On the criteria established by the ECrtHR in this decision on the duty to ask the CJEU for a preliminary reference, see C. Lacchi, 'The ECrtHR's Interference in the Dialogue between National Courts and the Court of Justice of the EU: Implications for the Preliminary Reference Procedure' *Review of European Administrative Law* 8 (2015) 95–125.

102 ECJ, 15 January 2014, *ibid*.

103 ECJ, Grand Chamber, 19 July 2012, *Littlewoods* v *Her Majesty's Commissioners*, points 27, 28, 31 and reference to rulings, 7 January 2004, case 201/02, *Wels*, 19 September 2006, cases 392/04 and 422/04.

104 ECHR, 4 February 2014, n 25376/06, *Ceni* v *Italy*, points 98, 99, 100, 101 and the reference to ECHR, 6 June 2013, n 38450/05, *Sabanchiyeva et al* v *Russia* and to ECHR, 20 June 2002, n 50963 /99 *Al-Nashif* v *Bulgaria*.

105 These points have already been made in Vettori, n 66 above, 153 *et seq*.

more and more entrusted to domestic and European constitutional principles[106] and to new techniques of legal reasoning, partly to be built in part in the new dialogue between legal sciences and Court practice. Some brief remarks with regard to the first and second aspect will suffice.

19th century French commentators[107] had a very clear view of the value of security and freedom of trade *'qui exige qu'on ne puisse facilement revenir contre les conventions'*.[108] The stability of contract entered the *Code Civil*, yet Article 6 made it conditional upon a control of validity delimited by principles (of public order and morality) that required requiring the search, on the part of positive law, for what was useful and right, for the purposes and conditions outlining its legal regime.[109]

In Italy, legal positivism in the early decades following the Second World War[110] guaranteed certainty of law by stabilizing the values expressed by the new democratic system and contributed, in the period of the economic miracle, to strengthening the State as the sole source of law and as an institution capable of ensuring the country's rebirth.[111] The balance collapsed at the end of the Sixties with the bursting of protests, the spreading of political instability and the consolidation of a new function of the State and of law.

The insufficiency of a single structural vision of reality was felt, and a new view values was attributed to the individual function,[112] to the conduct and to

106 Grossi, n 2 above, *ibid*. The late Norbert Reich offered an instructive analysis in this regard of the role of the proportionality principle: How Proportionate is the Proportionality Principle?, in H.-W. Micklitz and B. De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Portland: Intersentia, 2012) 83–111.

107 R.J. Pothier, *Traitè des obligations* (Bruxelles: Tome premier, 1835) 26.

108 J. Ghestin, in *Traité de droit civil, Le Contrat: formation* (Paris: Générale de Droit et de Jurisprudence, 1988) 178 *et seq*.

109 Ghestin, n 108 above, though in a historical and comparative prospective, see the essays by A. Rieg, *Le rôle de la volonté dans l'acte juridique en droit civil français et allemand* (Paris: Pichon & Durand-Anzias, 1961); J.P. Dawson, 'Unconscionable coercion: the German version'*Harvard Law Review* 1975, 1041; J. Gordley, 'Equality in exchange' *California Law Review* 1981, 1587. G. Vettori, 'Autonomia privata e contratto giusto'*Rivista diritto privato* 2000, 21 *et seq*.

110 N. Bobbio, *Il positivismo Giuridico, Lezioni di filosofia del diritto* (collected by N. Mora, Turin: Giappichelli, 1960). The author, in paragraph 32 page 151 et seq, concluded: 'legal positivism can be considered under three perspectives. a) a certain way of approaching law; b) a certain theory of law; c) a certain ideology of law'.

111 N. Bobbio, *Dalla struttura alla funzione. Nuovi studi di teoria del diritto* (con Prefazione di G. Losano, Rome-Bari: Laterza, 2007, reprint) VI.

112 For an effective synthesis, see S. Orlando, 'Fattispecie, comportamenti, rimedi. Per una teoria del fatto dovuto' *Rivista trimestrale diritto processuale civile* 4 (2011) 1033 and G. Vettori, 'Diritti, principi e tecnica rimediale nel dialogo fra le Corti' *Europa e diritto privato* 2011, 237 *et seq*.

fairness. The philosophy in France,[113] Germany[114] and America[115] started a post-positivistic phase that was more suitable for complex legal systems, where the line between moral rule and legal rule was becoming increasingly blurred.

In the last decades of the century, the decline of statutes was made evident especially by two phenomena in particular:[116] the impossibility for Institutions to impose rules on a financial capitalism capable of concentrating its power in a few invisible centres, and the mistrust of the relationship between voting and representation.[117]

This affected our views on the 'given and accepted' system of order that is now missed. The pyramid described by Article 1 of the Italian Civil Code and Article 12 of the Italian General Provisions has now been replaced by different and complementary sources. The Constitution, the Community European system and international obligations are implemented by law but also by national, Community European and international Courts liaising with each other. Now the Fiscal Compact imposes strong limits on even the political action of States.[118]

The essence of legality changes and this change means that the rule is to be identified in a qualitatively different scenario, resorting to principles and general clauses where the mingling between *logos* and *nomos,* between rules and reasonableness, is often inseparable, for the precept must be contextualized in the dispute, governed by heterogeneous sources, where the 'steps' of normativity do not give immediate responses. This does not evoke the ideological choice that was typical of legal positivism;[119] rather, it only expresses the complexity of a society to be ordered differently from the past.

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113 J. Ghestin, 'L'utile e le juste dans le contracts' *Archives de philosophie du droit* 1981, 35 *et seq*.

114 G. Husserl, *Recht und Zeit* (Frankfurt/Main: Klostermann, 1955) and references of L. Mengoni, 'Diritto e tempo' *Jus* 1998, 635 *et seq* now in *Scritti I*, n 81 above, 13.

115 R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978); N. Muffato (ed), *R. Dworkin, I diritti presi sul serio* (new Italian edition, Bologna: Il Mulino, 2010); R. Dworkin, *Justice in Robes* (Cambridge, Mass: Belknap Press of Harvard University Press, 2006); R. Dworkin, *La giustizia in toga* (Rome Bari: Laterza, 2010), and *Diritto e morale*, 3 *et seq; Trenta anni dopo*, 204 *et seq*.

116 J.-W. Müller, *L'enigma democrazia* (Italian translation, Turin: Einaudi, 2012) X *et seq*.

117 It has been rightly said that in the 20th century, extraordinary transformations took place (from oil lamp lighting to the Internet) that could not but affect our political and social system. A. Schiavone, *Non ti delego* (Milan: Rizzoli, 2013) 24 *et seq*; 56 *et seq*; 64 *et seq*.

118 G. Vettori, 'Il tempo dei diritti' *Persona e Mercato* 2013, 179, in www.personaemercato.it; *ibid* '*the adverse and favourable phases of the economic cycle*', *the budget balance* and the *limits to public spending*, have become ordering principles of European Treaties and of the national constitution. It remains to be seen how such choices will affect the content of rights since they weigh heavily and aggravate insidious critical issues.

119 Bobbio, n 110 above, 151 *et seq* and n 3. See also R. Alexy, *The Argument from Injustice: a Reply to Legal Positivism* (Oxford: Clarendon Press, English translation of *Begriff und Geltung des*

As it has been clearly said, the end of statutorily-governed situations required by laws and of law based on predictability and abstraction does not put an end to the work of jurists; rather, it only requires the shift from the law to principles and values to adopt the manners and techniques of a new legal reasoning, partly to be built but which presses and has been 'behind-the-scenes' for at least fifty years.

What is happening today is clear.

The shape itself of our democracy itself is changing.[120] The Constitutional State is increasingly placing the legislative function and the implementation of rules and principles on an equal footing.

Both the present and future are marked by this difficult yet unavoidable balance, in which the reasoning and action of all social sciences will be engaged.

Rechts, 1992). However, note that, on this point, Raz has stressed that Alexy's views about positivism are dissatisfactory: J. Raz, 'The Argument from Justice, or How not to Reply to Legal Positivism', in G. Pavlakos (ed),*Law, Rights and Discourse* (Oxford: Hart Publishing, 2007) 17–35.

120 M. Fioravanti, 'La trasformazione costituzionale' *Rivista trimestrale di diritto pubblico* 2 (2014) 295; M. Fioravanti, 'Legge costituzionale: il problema storico della garanzia dei diritti' *Quaderni fiorentini* 43 (2014) 1077 *et seq*.